APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-5168
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES WILSON CAWTHON,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(June 3, 1982)

Before TJOFLAT, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

Charles Wilson Cawthon, George Schindler and James Veal, also known as "the Colonel," were charged with conspiracy to possess marijuana with the intent to distribute in violation of 21 U.S.C. §§841(a)(1), 846. Cawthon alone was also indicted for possession of marijuana with intent to distribute. 21 U.S.C. §841(a)(1). Prior to and during the trial, Cawthon moved for a severance which was denied by the trial court. Cawthon was subsequently tried along with Schindler1/ and convicted by a jury. Cawthon then filed this appeal.

1/ "The Colonel" did not appear for trial.

According to the facts as disclosed by the record, undercover detective Woodrow Hill of the Tampa Police Department negotiated with Schindler for the purchase of one pound of cocaine. When the deal fell through because of Schindler's temporary inability to procure the cocaine, Hill informed Schindler that he was interested in selling a large amount of marijuana. Relying on that proposition, Schindler procured buyers for 1,000 pounds of marijuana and, after testing samples of the drug, introduced Hill to Cawthon and explained that only 350 pounds would be purchased initially. Cawthon then gave undercover officers $99,075.00, and drove away with 365 pounds of marijuana. He was subsequently arrested and the marijuana was seized.

During the trial, Schindler asserted an entrapment defense. He testified that he needed money quickly and had been unable to resist the temptation to make the marijuana deal in light of his financial predicament. During cross-examination, he admitted that he had been convicted of a felony and that Cawthon took possession of the marijuana. The government, in an effort to show background facts and to refute Schindler's claim that he was not predisposed to commit the crime, elicited testimony from Detective Hill concerning the aborted cocaine sale. Cawthon, who was not involved in the unsuccessful cocaine transaction, did not testify or introduce any evidence, but now alleges that the district court erred in refusing to grant his motion for severance. Because we find that the trial judge was correct in denying the motion, we affirm.

Cawthon urges that Schindler's entrapment defense as well as the evidence of Schindler's involvement in the cocaine deal and his past felony conviction mandated the grant of his severance motion. The grant or denial of a motion to sever is within the sound discretion of the trial judge and absent an abuse of that discretion, we will not disturb that decision. Fed.R.Crim.P. 14; *United States v. DeSimone*, 660 F.2d 532 (former 5th Cir. 1981); *United States v. Dohm*, 597 F.2d 535 (5th Cir. 1979), *reversed on other grounds*, 618 F.2d 1169 (5th Cir. 1980) (en banc). Judicial economy necessarily exerts strong pressure in favor of a joint trial of co-conspirators, *United States v. Wilson*, 657 F.2d 755 (5th Cir. 1981), and the burden rests with the movant to show that, without a severance, he or she

will be unable to obtain a fair trial. *United States v. Tombrello*, 666 F.2d 485 (11th Cir. 1982); *United States v. Mota*, 598 F.2d 995 (5th Cir. 1979), *cert. denied*, 444 U.S. 1084, 100 S.Ct. 1042, 62 L.Ed.2d 770 (1980). As the court stated in *United States v. Dohm*, 597 F.2d at 539, "A mere showing of some prejudice is usually insufficient; the movant must 'demonstrate compelling prejudice against which the trial court [was] unable to afford protection.' " *Quoting United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978). Schindler's reliance on a theory of entrapment cannot of itself justify reversing the district court's denial of the severance motion. *United States v. Salomon*, 609 F.2d 1172 (5th Cir. 1980). Cawthon must establish that Schindler's defense was irreconcilable, not merely antagonistic, with his position. *United States v. Mota, supra*. Since Cawthon did not offer a defense, Schindler's testimony did not meet this standard. *United States v. Dohm, supra; United States v. Marable*, 574 F.2d 224 (5th Cir. 1978). This is not a case in which one defendant provided the government with its best weapon against a co-defendant's theory of the case, see *United States v. Johnson, 478 F.2d 1129 (5th Cir. 1973), nor is it a situation where the testimony of one defendant amounted to highly prejudicial character evidence which otherwise would have been inadmissible if the co-defendant had been tried alone. See United States v. Salomon, supra.*

Neither does the evidence of Schindler's involvement in negotiations to sell cocaine or of his criminal record require severance. The test for determining if damaging evidence respecting one defendant improperly "spills over" to the prejudice of a codefendant is whether

> under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.

United States v. Salomon, 609 F.2d at 1175, *quoting United*

States v. Wasson, 568 F.2d 1214, 1222 (5th Cir. 1978). Normally, "[e]vidence of prior criminal offenses relating only to one defendant does not generate prejudice arising to the level that requires severance." *Salomon*, 609 F.2d at 1175; *United States v. Davis*, 546 F.2d 617 (5th Cir. 1977). Here, the district court acted well within the bounds of its discretion in concluding that the jury could sort out the evidence against the two defendants. The facts and legal theories were fairly simple and the court frequently and carefully instructed the jury as to the limited function of the evidence against Schindler. Record, Vol. 2 at 34-36, 40-41, 104, Vol. 3 at 154, 172-73; *see United States v. Phillips*, 664 F.2d 971, 1017 (former 5th Cir. 1981). Under these circumstances, it is evident to us that Cawthon received a fair trial.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-5168
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES WILSON CAWTHON,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING
(July 28, 1982)

Before TJOFLAT, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge